

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

ARYZTA, LLC

and

Case 31–CA–178826

BERNABE CIPRES, an Individual

Rudy L. Fong Sandoval, Esq., for the General Counsel.
Jason W. Kearnaghan Esq., (*Sheppard, Mullin, Richter & Hamilton, LLP*), for the Respondent.
Michael Nourmand, Esq., (The Nourmand Law Firm, APC),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts Associate Chief Administrative Law Judge Gerald Etchingham approved on November 21, 2017. The case was subsequently assigned to me.

Bernabe Cipres (Charging Party or Cipres) filed the initial charge on June 21, 2016, and an amended charge on September 29, 2016. The General Counsel filed the complaint on December 30, 2016, and Aryzta (the Respondent) filed a timely answer on January 11, 2017, denying all material allegations.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing a “Mutual Agreement to Arbitrate” (MAA).¹

¹ The complaint also contains allegations that the arbitration agreements violate the Act by prohibiting class/collective actions. These allegations were placed in abeyance pending the outcome of *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic System Corp.*, 823 F.3d 1147 (7th Cir. 2016), and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), pending before the Supreme Court at the time of this decision.

While the case was pending, the Board issued *The Boeing Company*, 365 NLRB No. 154 (2017), which overruled some of the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). As a result, the parties reached a revised stipulated issue and I permitted supplemental briefs. The Respondent objected to the initial stipulated issue and requested that I dismiss the complaint in its initial brief. Though the parties agreed to a revised stipulation, I note that even if they had not, I would not have dismissed the complaint based on the originally framed issue. This is because the Board in *Boeing*, at footnote 51, stated, “Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* ‘reasonably construe’ standard.” Arbitration agreements were not addressed in *Boeing*.

On the entire record, and after considering the brief filed by the General Counsel and the brief and supplemental brief filed by the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Los Angeles, California, manufactures and distributes prepared food products. In conducting its operations during the 12-month period ending June 21, 2016, Respondent derived gross revenues in excess of \$500,000, and purchased and received at its Los Angeles, California facility goods, supplies, and materials valued in excess of \$5000 directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about July 16, 2014, through on or about January 31, 2016, Respondent maintained the MAA. (Stip. ¶ 4(g); Jt. Exh. 2.)² The agreement informs employees they must individually arbitrate “any claims or controversies during or following your employment, whether or not they are in any way related to or associated with your employment or the termination of your employment with the Company.” (Jt. Exh. 2.) In the section entitled: “Claims Subject to Arbitration” the MAA states:

The “Claims” covered by this Agreement include, but are not limited to, all past, present, future claims, including any pending litigation, for: wrongful termination; breach of any contract or covenant, express or implied; breach of any duty owed to you by the Company or to the Company by you; disclosure of trade secrets or proprietary information, improper use of Company property or equipment; personal, physical or emotional injury; fraud, misrepresentation, defamation, or any other tort claims; wages or other compensation due; penalties; benefits; reimbursement of expenses; discrimination or harassment, including but not limited to discrimination or harassment based on race, sex, pregnancy, religion, national origin, ancestry, age, marital status, physical disability, mental disability, medical condition, genetic characteristics, gender expression, gender identity, or sexual orientation; retaliation; violation of any federal, state or other governmental Constitution, statute, ordinance or regulation (as originally enacted and as amended), including but not limited to Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act of 1967 (“ADEA”), the Americans With Disabilities Act (“ADA”), the Fair Labor Standards Act (“FLSA”); the Employee Retirement Income Security Act (“ERISA”), the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), the Family and Medical Leave Act (“FMLA”), the California Fair Employment and Housing Act (“FEHA”), the California Family Rights

² Jt. Exh.” stands for “joint exhibit” and Stip. stands for “stipulation of facts.” Although I have included some citations to the record, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

Act (“CFRA”), the California Labor Code, the California Civil Code, and the California Wage Orders. As used herein, “Claims” does not mean any dispute if arbitration of the dispute is prohibited by law. Employees may learn more about their legal rights by visiting websites hosted by federal and state governmental agencies. Current links to some of these federal websites are listed below, although they are subject to change by the hosting agencies: www.dol.gov; www.dol.gov/compliance/laws/comp-flsa.htm; www.dol.gov/dol/topic/waques/index.htm; and www.eeoc.gov/.

The MAA was given to employees in July 2014. Current employees were provided \$10 as consideration for signing the MAA. (Stip. ¶4(j).) Employees were given the option to forego the compensation and opt out of the MAA. Specifically, the MAA’s opt-out provision states:

You have 10 days after signing this Agreement to opt out of arbitration. If you opt out, then neither you nor the Company will be bound by the terms of this Agreement. To opt out, you must: (1) notify the Company in writing that you are opting out, (2) sign a notice of opt out; and (3) mail or have it delivered to your local Human Resources Representative so that the Company receives it no later than thirty (30) days after the date you signed this Agreement. Such written notice may simply state “I wish to opt out of the arbitration program” or words to that effect. If no such notice is delivered before the 10-day deadline, then this Agreement will become fully effective and binding upon the date below.

Following the opt-out provision, the MAA states:

BY SIGNING THIS AGREEMENT, THE PARTIES HEREBY WAIVE THEIR RIGHT TO HAVE ANY DISPUTE, CLAIM OR CONTROVERSY DECIDED BY A JUDGE OR JURY IN A COURT.

BY SIGNING THIS AGREEMENT, YOU ACKNOWLEDGE THAT YOU HAVE CAREFULLY READ THIS AGREEMENT, THAT YOU UNDERSTAND ITS TERMS, AND THAT YOU HAVE ENTERED INTO THIS AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT.

(Jt. Exh. 2.)

The Charging Party was hired at Aryzta on August 26, 2013. He signed a copy of the MAA on July 16, 2014, accepted the \$10 consideration, and did not exercise his opt-out rights. (Stip ¶¶ 4(i); Jt. Exhs. 3–4.)

In February 2016, Aryzta revised the MAA (“Revised MAA”). The revised version, which is not alleged to violate the Act, contains the following provision entitled: “Claims not Subject to Arbitration”:

You and the Company agree that neither party shall initiate or prosecute any lawsuit or administrative action in any way related to any Claim covered by this Agreement, except that this Agreement does not prohibit the filing of or pursuit of relief through the

following: (1) a Court action for temporary equitable relief in aid of arbitration, where such an action is otherwise available by law, (2) an administrative charge to any federal, state or local equal opportunity or fair employment practices agency, (3) an administrative charge to the National Labor Relations Board, or (4) any other charge filed with or communication to a federal, state or local government office, official or agency.

The following actions are not covered by this Agreement: (1) claims for workers' compensation or unemployment compensation benefits, (2) claims that as a matter of law cannot be subject to arbitration, (3) claims under an employee benefit or pension plan that specifies a different arbitration procedure, and (4) claims covered by (and defined in) the Franken Amendment, first enacted in Section 8116 of the Defense Appropriations Act of 2010, or any similar statute, regulation or executive order, including but not limited to Executive Order 13673 to the extent that any such statute, regulation or executive order is effective and applicable to this Agreement.

(Jt. Exh. 6.)

III. DECISION AND ANALYSIS

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. The rights Section 7 guarantees include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” Interfering with employees’ rights to file charges with the Board or other public agencies in furtherance of concerted employee activities concerning wages or other working conditions violates Section 8(a)(1). See, e.g., *Bill’s Electric*, 350 NLRB 292, 296 (2007); *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 1 (2016).

A. *The Boeing Case*

On December 14, 2017, the Board issued *Boeing Co.*, 365 NLRB No. 154 (2017), which reversed part of the Board’s longstanding paradigm, set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for evaluating workplace rules.³ Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful.⁴ For facially neutral rules, a violation was previously “dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage* at 647. See also *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007)(applying *Lutheran Heritage* to determine if arbitration policy violated the Act). *Boeing* overruled *Lutheran Heritage* with respect to the first prong of the facially-neutral paradigm, and the Board no longer will find certain work rules unlawful merely upon a showing that employees would reasonably construe the rule’s language to prohibit or interfere with Section 7 activity.

³ *Boeing* was given retroactive application.

⁴ This part of *Lutheran Heritage* was not reversed by *Boeing*.

Instead, when faced with a work rule that would, reasonably read, potentially interfere with NLRA rights, the Board will conduct a balancing test that considers: (1) the nature and extent of the potential interference with Section 7 rights; and (2) legitimate employer justifications for the rule. *Boeing*, slip op. at 3.

After applying the balancing test, the Board will place it into one of three categories, as described in *Boeing*:⁵

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. slip op. at 3–4 (footnote omitted).

B. Interpreting the MAA

The Board has applied *Lutheran Heritage*’s “reasonably construe” standard to determine whether arbitration agreements violate the Act by interfering with employees’ ability to file charges with the Board. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006); *Securitas Security Systems*, 363 NLRB No. 12 (2016); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4 (2015). The revised *Boeing* standards, however, cause me to take a closer look at the nature of the MAA and the language of *Lutheran Heritage*, and to question whether such application fits. In my view, the MAA is not a workplace rule; it is a contract that explicitly addresses fundamental Section 7 rights. As such, I do not believe the analysis proceeds to the *Lutheran Heritage* facially neutral criteria.

The “reasonably construe” standard applies only to rules that do not explicitly restrict activity protected by Section 7. In *Lutheran Heritage*, the Board analyzed whether a rule about using

⁵ The categorization must come after the balancing test, as the Board stated, “The above three categories will represent a classification of *results* from the Board’s application of the new test.” *Id.* slip op. at 4.

abusive or profane language in the workplace was unlawful on its face as follows: “The rules do not expressly cover Section 7 activity. Nor are verbal abuse and profane language an inherent part of Section 7 activity.” *Lutheran Heritage*, supra. at 647. Only after making this determination did the Board move on to the criteria for facially neutral rules. The first step then is to determine whether the MAA expressly covers Section 7 activity or whether the conduct it seeks to regulate is an inherent part of Section 7 activity.⁶ For the reasons discussed below, I find the conduct the rule seeks to regulate, *i.e.* litigation of workplace disputes, expressly covers Section 7 activity and/or is an inherent part of Section 7 activity.

Notably, the very essence of the MAA is different than most workplace rules. The MAA, like most other arbitration agreements, does not regulate workplace conduct at all. Instead, it regulates the employees’ and the employer’s legal forum in the event of a dispute, such as, for example, a dispute over discipline for violating a rule in the employee handbook. The MAA is a rule about how employees and the employer can litigate, pure and simple. It encompasses, in a very direct way, employees’ rights to file charges with the Board. It is therefore not facially neutral with regard to its subject matter. Its express connection to Section 7 rights is markedly different than, say, a rule prohibiting violence in the workplace or a rule monitoring workplace dress and appearance. As the rule clearly governs employees’ right to file Board charges, the only question that remains is, does the MAA, as written, curtail those rights?

To answer this question, the MAA’s draftsmanship must be key, and the required focus on draftsmanship is another important distinction between the MAA and other typical workplace rules. As the Board noted in *Lutheran Heritage*, “Work rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law.” 343 NLRB at 648; see also *Boeing*, supra. at fn. 41. Not so with the MAA.

With most work rules, the task is to interpret the impact of a plain-language rule about employee conduct on employees’ NLRA rights. The no-photography rule in *Boeing* will generally be readily understood by employees who can read. Language in that rule, as well as in rules promoting workplace civility and most other common workplace rules, consists of words people actually use in their lives. Where there is specialized language in workplace rules, it generally involves words specific to the employee’s job or industry, which the employees will know by virtue of training and performance in that job or industry.

By contrast, arbitration agreements, such as the MAA here, are invariably drafted using legalese, and are inherently more difficult for employees to interpret than most work rules.⁷ The language in the MAA largely consists of legal terms of art, so the task for the employee becomes untangling legally complex and specific terms and phrases. In the section “Claims Subject to Arbitration,” for example, the MAA refers to “breach of any contract or covenant, express or

⁶ The crux of the issue in this case is whether the MAA is facially neutral with regard to employees’ rights to access the Board. What does the agreement, on its face, actually say? Facial neutrality is not a threshold issue—it is the ultimate issue.

⁷ Indeed, the MAA here instructs the employee that he or she may want to seek legal advice prior to signing the document. It goes without saying that not all applicants for employment can afford to consult a lawyer prior to signing an arbitration agreement.

implied,”⁸ “violation of any federal state or other governmental constitution, statute, ordinance or regulation (as originally enacted and as amended) . . .,” and various other types of claims which have specific legal meaning and often convoluted procedural enforcement apparatus not readily known to lay employees.⁹

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If the language itself is not confusing enough, figuring out what the MAA actually says requires comparing various provisions that can be difficult to reconcile. For example, the first sentence of the MAA states:

10

This Agreement requires you and the Company to arbitrate any claims or controversies during or following your employment, whether or not they are in any way associated with your employment or the termination of your employment with the Company (defined in Section 1, below.)

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This opening statement is not really accurate, as there are many exceptions to the requirement it seeks to impose, which are described in later sections. It would be very easy to add qualifying language to cure this initial sentence’s inaccuracy. Just add, “With certain exceptions below” or similar verbiage at the sentence’s outset, and it becomes a true standalone sentence. It begs the question why any employee would read this sentence and think it means anything other than what it says—arbitrate all disputes.

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A final distinction between the MAA and most workplace rules or policies is that the MAA is a contract between the employee and employer. As noted above, it does not regulate workplace conduct; it’s about litigation. It is also three pages long, contains various sections that cross-reference each other, and is clearly drafted as a legal instrument.

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Most importantly, however, the MAA is enforced as a contract, not as a garden variety workplace rule. Section 1 of the Restatement 2d of Contracts defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” If the employer believes an employee is violating its dress code, the employer’s redress is in the form of workplace discipline, not a lawsuit. If the employer believes an employee has breached the MAA, its recourse is to file a motion in court. The MAA also bears other indicia of a contract, such as enforceability by both parties.

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Because I find the MAA is a contract, and determining what it says on its face requires interpretation of legal terms, contract law is implicated. One of the primary canons of contract law is that a contract’s terms should be harmonized if possible. As noted above, the MAA seems to state two different things. The first sentence states:

35

40

This Agreement requires you and the Company to arbitrate *any* claims or controversies during or following your employment, whether or not they are in any way related to or

⁸ Employees who understand the breach of implied covenant ironically might have a tool to argue against the MAA’s enforcement.

⁹ Section 3 of the MAA requires the employee to agree that he understands the Company is engaged in transactions involving interstate commerce.

associated with your employment or the termination of your employment with the Company.

...

(Emphasis supplied.) In section 4, “claims” is defined to include “violation of any federal . . . statute,” with no specific exception for the NLRA. On page 2, the MAA states, toward the end of Section 4:

As used herein “Claims” does not mean any dispute if arbitration of the dispute is prohibited by law.

10 The exception does not address “controversies.”

In other words, the first sentence of the entire document read together with the first sentence of section 4 states that any “claims or controversies” must be arbitrated and defines “claims” to include violations of federal statutes. The provision near the end section 4, by belatedly providing an exclusionary definition of “claims” that requires employees to know what claims cannot be subjected to arbitration by law, essentially states that not all claims must be arbitrated.¹⁰ Then again, at the end of the document in the paragraphs above the signature line, the MAA states, emphasized in all caps:

20 BY SIGNING THIS AGREEMENT, THE PARTIES HEREBY WAIVE THEIR RIGHT
TO HAVE ANY DISPUTE, CLAIM OR CONTROVERSY DECIDED BY A JUDGE
OR JURY IN A COURT.

25 Parsing the document like a lawyer, the first sentence can arguably be read in conjunction
with language toward the end of section 4, buried directly beneath a sentence containing over
245 words (most of which are legal terms), to exclude arbitration of disputes that could comprise
NLRA charges. Even interpreted by someone trained in the law, this is a tortured way for a
document to say employees are free to file NLRA charges.¹¹ It is virtually impossible to believe
30 the lay employee will be able to follow this maze and conclude he may file a claim about
wrongful termination or wages (specifically subject to arbitration in the MAA) under the
National Labor Relations Act (a federal statute, claims under which are specifically included in
the MAA) with the Board.¹²

¹⁰ General exception language like the clause present here has not withstood scrutiny even in the dissents from Board decisions finding arbitration agreements violate the Act. See, e.g., *Solarcity Corp.*, supra. slip op. at 10–11 (Member Miscimarra dissenting).

¹¹ This is particularly true considering “controversy” and “dispute” are not defined in the MAA

¹² This is true regardless of whether evaluated “as reasonably interpreted,” “focusing on the employees’ perspective,” or from the standpoint of a “reasonable employee who is ‘aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job.’” *Boeing*, fn. 14.

There are other inconsistencies in the MAA, such as specifically including Title VII and other discrimination claims as included “claims” that must be arbitrated, but then, in its vague exception, excluding the legal right to file a charge alleging violation of Title VII as a “claim” because to do so would violate the law. All “past present and future claims” for “wrongful terminations” and for “wages and other compensation due” are also included as covered claims.

In cases of uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, i.e. the drafting party.¹³ See, e.g., Restatement (Second) of Contracts § 206; *United States v. Seckinger*, 397 U.S. 203, 210 (1970). As the Court stated in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, (1995), “Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt.”¹⁴

Because the MAA states, on its face, that all claims or controversies must be arbitrated, and all violations of federal statutes must be arbitrated, and it does not provide a clear exception for NLRA charges, I find it restricts employees’ access to Board procedures and violates Section 8(a)(1). I address the opt-out provision in section D below.

C. Application of *Boeing*

Even if the MAA is considered facially neutral, application of the *Boeing* test still results in a violation of Section 8(a)(1). Applying the balancing test, under a reasonable interpretation of the MAA, I find the nature and extent of the potential interference with Section 7 rights outweighs any legitimate business justification.

Turning to the “reasonable interpretation” part of the balancing test, a plurality of two members (then-Chairman Miscimarra and Member Emmanuel), stated it should be resolved by, “focusing on the employees’ perspective,” asking if the rule or policy “would potentially interfere with the exercise of NLRA rights.” Member Kaplan, in a concurring statement, framed the inquiry as follows:

the threshold inquiry of whether the rule, when reasonably interpreted, prohibits or interferes with [NLRA rights] should be determined by reference to the perspective of an objectively reasonable employee who is “aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.”¹⁵

Under either standard, I find the MAA would potentially interfere with the exercise of NLRA rights for the reasons detailed above.¹⁶

The nature and extent of potential interference strike at the heart of the employees’ legal rights, for if employees believe they cannot file Board charges, there is no recourse for violations of the Act. Employees’ ability to file charges with the Board is “integral to the Act.” *Supply Technologies, LLC*, 359 NLRB 379 (2012). “As the Supreme Court has explained, Congress

¹³ The Board in *Boeing* found that “the Board has consistently misapplied an evidentiary principle that ambiguity in general work rule language must be construed against the drafter.” Slip op. at fn. 43. I am deciding whether a contract about litigation, not a “general work rule”, violates the Act.

¹⁴ This is particularly true with adhesion contracts, such as the MAA. See *Batory v. Sears, Roebuck and Co.*, 124 Fed.Appx. 530, 531–532 (9th Cir.2005) (arbitration agreement was adhesion contract even though employees were given a choice as to whether to enter into the agreement).

¹⁵ As detailed above, the concurring view demonstrates why *Boeing* and the MAA are a misfit—the “everydayness of his job” aspect of the test has no application.

¹⁶ The Respondent’s arguments about the exclusion to the definition of “claims” is specifically addressed above.

aimed to ensure that employees were ‘completely free from coercion’ with respect to Board access.” Id. quoting *NLRB v. Scrivener*, 405 U.S. 117, 123. (1972).

Accordingly, I find that analyzed under *Boeing*, the MAA is unlawful because, as reasonably interpreted, it would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by any justifications associated with the rule.

D. The Opt-Out Provision

The Respondent argues that the MAA does not violate the Act because it is voluntary and does not impose sanctions for employees who violate it. As addressed above, there are no sanctions because the MAA is a contract and redress of violations of it is through the legal system.

I agree with the Respondent that the MAA is not a mandatory condition of employment by virtue of the opt-out provision.¹⁷ The question that remains is of whether an opt-out provision like the current one, which does not eradicate the employees’ rights, nonetheless interferes with or coerces employees. This in turn raises the question of under what conditions, if any, an employee can prospectively and irrevocably waive his statutory right to engage in protected activity.

Abundant caselaw has developed on the issue of when a union may, through collective bargaining, waive employees’ statutory rights. In the context of collective bargaining, “in order to establish a waiver of a statutory right, there must be a clear and unmistakable relinquishment of that right.” *Gem City Ready Mix Co.*, 270 NLRB 1260, 1260–1261 (1984); see also *In re Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949) (establishing the “clear and unmistakable” standard for waivers of statutorily protected rights); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated’.”); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009).

With regard to individual employees who are not party to a collective-bargaining agreement, the Supreme Court’s decision in *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), that an employer cannot not contract with individual employees to relinquish their rights under the Act, provides the fundamental answer. In *National Licorice*, a committee of three employees negotiated a contract with the employer providing for a wage increase, overtime, holiday pay, and vacation time. The contracts as executed were between the employer and the individual employees who signed them. Employees who signed the contract relinquished their rights to strike, demand a closed shop, or sign an agreement with any union. Employees who did not sign the contract did not reap its benefits.

The focus in *National Licorice* was the employment contracts themselves, not whether they were conditions of continued employment; they were not. Because the contracts

¹⁷ Unlike the description of claims covered by arbitration, the opt-out provision section of the MAA is easy to understand.

discouraged membership in a labor organization, and constituted “yellow dog” agreements, they were found to be invalid. The right to file charges with the Board is just as protected as the right to engage in union activity. The agreement, whether it is a condition of employment or not, extracts a promise to refrain from activity protected by Section 7, and is therefore invalid under the reasoning set forth in *National Licorice* and like cases. See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944) (contracts utilized as a means of interfering with rights guaranteed by the Act invalid); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (employment contract requiring employees to attempt to resolve employment disputes individually with employer is per se violation even if “entered into without coercion” and not all employees signed because it was a “restraint upon collective action”); *Jahn & Oilier Engraving Co.*, 24 NLRB 893, 900–901, 906–907 (1940), enfd. in relevant part, 123 F.2d 589, 593 (7th Cir. 1941).

Employees clearly have the statutory right to file Board charges. As noted above, the Board has held that access to the Board’s procedures is “integral to the Act.” *Supply Technologies, supra*. “It is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void.” *Bristol Farms*, 363 NLRB No. 45, slip op. at 3 (2015). Compare the statutory right to freedom from religious discrimination under Title VII of the Civil Rights Act of 1964. One of the processes available for employees to enforce this statutory right is by requesting religious accommodation from the employer to permit the employee to observe his religion while retaining his job. It is difficult to imagine an employment contract requiring employees to agree they will not avail themselves of the employer’s processes for seeking religious accommodation, with a 10-day opt-out provision, would pass muster. An agreement to forego the statutorily protected activity of filing Board charges, with a 10-day opt out provision, is a similar prospective waiver of fundamental statutory rights.

Based on the foregoing, I find that even with the opt-out provision, the MAA violates Section 8(a)(1).

CONCLUSIONS OF LAW

1. By maintaining mutual agreement to arbitration (MAA) from July 16, 2014, to January 31, 2016, that interferes with employees’ fundamental Section 7 right to file charges with the Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining mutual agreement to arbitration (MAA) from July 16, 2014 to January 31, 2016, that interferes with employees’ fundamental Section 7 right to file charges with the Board, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Respondent maintained a mutual agreement to arbitration (MAA) from July 16, 2014 to January 31, 2016, that interfered with employees’ fundamental Section 7 rights to file charges with the Board, I will order the Respondent to cease and desist from interfering with, restraining, or coercing employees in the exercise of rights in any like or related manner.

The Respondent shall notify all current and former employees who were required to sign the MAA, who did not receive and sign the Revised MAA, that it been rescinded or revised and provide them a copy of the revised agreement. I will recommend that the Respondent post a notice in all locations where the MAA was utilized.¹⁸ *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006); see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (DC Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Aryzta, LLC, its officers, agents, and representatives, shall

1. Having maintained a mutual agreement to arbitration (MAA) from July 16, 2014 to January 31, 2016, that interferes with employees’ fundamental Section 7 right to file charges with the Board, cease and desist from violating the Act in any like or related manner.

2. Notify all applicants and current and former employees who signed the MAA who did not receive and sign the Revised MAA, that it been rescinded or revised and provide them a copy of the revised agreement.

3. Within 14 days after service by the Region, post at its Los Angeles, California facility and all other facilities where the MAA has been maintained, copies of the attached notice marked “Appendix.”²⁰ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the

¹⁸ The Respondent’s brief states that the bakery where Cipres worked was sold on March 1, 2018. This is not a stipulated fact, so the remedies in this decision do not reflect a sale, but such a contingency is provided for in the decision.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2014.

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Dated, Washington, D.C., April 9, 2018.

A handwritten signature in black ink, appearing to read "Eleanor Laws", written in a cursive style.

10

Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a mutual agreement to arbitrate (MAA) that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL rescind the arbitration agreement in all of its forms on a nationwide basis to make clear to employees that the arbitration agreement does not prohibit or restrict employees' right to file charges with the Board, including charges that seek to raise group or collective concerns.

WE WILL notify all applicants and current and former employees who signed the mutual agreement to arbitrate (MAA), at any location but did not sign the Revised MAA that the MAA has been revised.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

ARYZTA, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064
(310) 235-7352, Hours 8:30 a.m. – 5 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/31-CA-178826> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W, Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, COMPLIANCE OFFICER, (310) 235-7424